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In the Supreme Court of the United States

OCTOBER TERM, 1997

DONALD LEE EARLES AND CATHERINE PAPAJOHN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an out-of-court statement is categorically barred from admission at trial under the "residual" exception to the hearsay rule, Fed. R. Evid. 804(b)(5), if it nearly satisfies, but does not quite satisfy, the requirements of another exception to that rule.

2. Whether the particular grand jury testimony of a prosecution witness who refused to testify at petitioners' trial had sufficient indicia of reliability to justify the admission of that testimony under Rule 804(b)(5) and the Confrontation Clause of the Sixth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 25a-37a) is reported at 113 F.3d 796. The opinion of the district court granting petitioners' motion for judgment of acquittal (Pet. App. 1a-24a) is unreported. The district court's opinion of November 4, 1997, denying petitioners' motion for a new trial under Federal Rule of Criminal Procedure 33, is not yet reported in the Federal Supplement, but may be found at 1997 WL 688737.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1997. A petition for rehearing was denied on June 18, 1997. Pet. App. 38a. The petition for a writ of certiorari was filed on September 16, 1997. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Iowa, petitioners were found guilty of arson, in violation of 18 U.S.C. 844(i) (Count 1); mail fraud (or, in the case of petitioner Earles, aiding and abetting mail fraud), in violation of 18 U.S.C. 1341 (Counts 2 and 3); and conspiracy to commit those offenses, in violation of 18 U.S.C. 371 (Count 5). Pet. App. 2a, 4a-5a. The district court thereafter granted petitioners' post-trial motions for judgment of acquittal on the ground that certain grand jury testimony had been improperly admitted at trial, and that without that testimony the evidence was insufficient to convict them. The court of appeals reversed, and remanded with instructions to reinstate the jury's verdict. Petitioners have not yet been sentenced.

1. Petitioner Papajohn owned and operated the Countryside IGA, a grocery store in Sloan, Iowa. Petitioner Earles, who lived with Papajohn as her common-law husband, operated Cade, Inc., a business that reconditioned car parts and sold cars. That business was operated out of the Cade Building, which was owned by Papajohn; Earles had given her the money to buy the building to protect the asset from Earles' ex-wife, who had a judgment against him. Earles occasionally worked at the IGA. Earles' adult son, Donald Scott Earles (Donnie Earles or Donnie), resided in the Sloan area. Gov't C.A. Br. 3, 27-29.

In late 1988 and early 1989, the IGA was in serious financial trouble. Papajohn was falling behind in her payments to creditors and vendors, and she was six

months in arrears in her payments on a secured note for the IGA inventory at the Sloan State Bank. Moreover, her checking account was often overdrawn, and her business owner's insurance premium was almost due. In late 1988, Papajohn tried but failed to find a buyer for the IGA. Gov't C.A. Br. 3, 29-31.

At approximately 1:00 a.m. on January 23, 1989, Deputy Gary Edwards saw Donnie Earles enter the Cade Building, followed shortly thereafter by his father, who had just left the IGA. A blue pickup truck registered to Cade, Inc., was parked in front of the IGA. A short time later, Deputy Edwards saw the two men leave the Cade Building in the blue pickup. Petitioner Earles and Donnie drove to Papajohn's residence, which they entered through the back door. Gov't C.A. Br. 4, 31-32.

At about 3:55 a.m., the authorities received notice that the IGA was on fire. The fire chief arrived at the scene soon afterwards. Flames were coming through the back door and window. The fire chief entered through the back door, which was slightly ajar, and found a set of oxygen acetylene tanks just inside the doorway. Their valves were burned off, and the handles were cut through. A sheriff's deputy also present at the fire scene spoke with petitioners, who were sitting in a truck nearby. Petitioners were both calm. They gave the deputy separate addresses, even though they lived together. Gov't C.A. Br. 4, 32-33.

After the fire had been put out, empty cans of charcoal lighter fluid were found in various places in the basement and on the first floor near the elevator shaft; debris from the fire contained petroleum distillate, a material commonly available as charcoal lighter fluid. Gov't C.A. Br. 33-36. On January 17, 1989—one week before the fire—Papajohn had ordered

four cases of lighter fluid, an order that she had received before the night of the fire. *Id.* at 31. Moreover, one or two days before the fire, petitioner Earles and Donnie had brought the acetylene torches into that back room and had placed them close to the electrical panel; the worst damage from the fire occurred where the acetylene torches were found. *Id.* at 39. Further, petitioner Earles told the insurance investigator that, on the evening of the fire, he had entered and exited the store by way of the front door because the back door had been barred. An investigation showed, however, that the bar used to block the back door was not in place at the time of the fire. *Id.* at 35, 40. A fire marshal, an insurance investigator, and an electrical engineer inspected the fire scene and determined that the fire was incendiary, that it had multiple points of origin, and that a flammable liquid had been used as an accelerant. *Id.* at 4, 33-37.

Papajohn presented a claim for damages caused by the fire to St. Paul Fire and Marine Insurance Company. Because, at the time of payment, the insurance company was not aware of any "direct involvement" by Papajohn in the setting of the fire, see Gov't C.A. Reply Br. 1, it mailed her six checks totalling $188,665 in settlement of her claim, Gov't C.A. Br. 4-5.

2. Before petitioners were indicted, Donnie Earles testified twice before a grand jury under a grant of use immunity.[1] On May 15, 1991, during his first

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[1] Petitioners and Donnie had previously been the subject of an investigation into a mail fraud scheme involving the sale of non-existent goods to farmers. *United States* v. *Earles*, 955 F.2d 1175 (8th Cir. 1992). Trial of that matter resulted in petitioner Earles' conviction and Papajohn's acquittal. Pursuant to an agreement with the government, Donnie pleaded guilty to

appearance, Donnie told the grand jury that he did not know who had burned down the IGA but that he would not put it past his father and Papajohn to do such a thing. At his second appearance on July 17, 1991, Donnie told the grand jury that he knew much more than he had earlier disclosed about the fire. He testified that, on the day of that fire, his father had told him that he planned to burn the IGA, that he had unsuccessfully attempted to do so the night before, and that he would try again that night. Petitioner Earles had explained to Donnie that he and Papajohn wanted to be rid of the IGA and needed the insurance money to pay off their debts and start over again. In preparation for the fire, Donnie recounted, petitioner Earles had put boxes under the stairway, stockpiled cases of lighter fluid under and above the elevator, sprayed the store with lighter fluid, and started the fire. Petitioner Earles had also confided in Donnie that he had barely been able to get out of the store because the lighter fluid had ignited so quickly. Donnie testified that he had wanted to recount those facts during his first grand jury appearance, but that he had not wanted to betray his father. Pet. App. 26a; Gov't C.A. Br. 5-6, 10-11.

Petitioners were indicted in October 1991. In early March 1994, while pretrial motions were pending, Donnie informed the government, through his attorney, that he would not testify at his father's trial. Concerned that Donnie had been pressured, the government brought Donnie before the grand jury

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conspiracy to commit mail fraud in return for his cooperation in several matters under investigation, including the burning of the IGA. Donnie appeared before the grand jury pursuant to that plea agreement.

for a third time on April 5, 1994. Donnie told the grand jury that he was not going to testify against petitioners. He explained that his decision was not based on his Fifth Amendment right against self-incrimination, but that "[s]omething inside of [him]" prevented him from testifying against his father. 4/5/94 Tr. 20; see also *id.* at 11, 14. Similarly, he stated that he could not testify against Papajohn because she was "involved" with his father. *Id.* at 16; see also Pet. App. 26a-27a; Gov't C.A. Br. 5-6, 11-12.

3. The district court held a pretrial hearing concerning the circumstances underlying Donnie's grand jury testimony. Testimony at that hearing showed that, following Donnie's first grand jury appearance, agents talked to him further about his knowledge of the fire. Donnie denied any involvement and agreed to take a polygraph test. During the trip to Omaha, where the polygraph examination occurred, Donnie, who was nervous, told government agent Dan Fridley that he had some information that he had not shared before. He stated that his father had told him that he started the fire in order to collect the insurance proceeds. He added that, a few days after the fire, his father had told him that stockpiling the charcoal lighter fluid had paid off and that he had barely escaped from the blaze alive. Donnie further told Agent Fridley that, before the fire, he had heard a conversation between his father and Papajohn about burning the building to collect enough insurance money to help them pay off their considerable debts. In Omaha, just before taking the polygraph test, Donnie repeated that account and provided additional details. Gov't C.A. Br. 17-19; 5/13/94 (a.m.) Tr. 6-9, 25-26, 30, 41-42, 92-93.

After the polygraph test was complete, the polygraph examiner stated that Donnie's responses to some of his questions indicated deception. The examiner believed that he was telling the truth about his father's involvement in the fire, but that he was holding back something else. The examiner speculated that Donnie himself might have been involved in the preparation of the fire or that he might have been present at the scene. Gov't C.A. Br. 20-21; 5/13/94 (a.m.) Tr. 12-14; 6/23/94 Tr. 62, 69-70, 83.

4. At trial, Donnie refused to testify despite a grant of use immunity, was found in contempt of court, and was sent to jail.[2] The court declared Donnie an unavailable witness (see Pet. App. 7a & n.3) and allowed the government to read portions from all three of the transcripts of Donnie's grand jury testimony. In admitting that testimony, the court relied on Rule 804(b)(5) of the Federal Rules of Evidence, the "residual" hearsay exception governing the admissibility of out-of-court statements made by witnesses who are unavailable to testify at trial. *Id.* at 28a-30a. Rule 804(b)(5) provides that "[a] statement not specifically covered by any of the foregoing

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[2] Petitioners' trial had originally been severed, and Papajohn had proceeded to trial first. At that trial, Donnie refused to testify, asserting his privilege against self-incrimination (even though he had been granted immunity, see Pet. App. 2a) and insisting as well that he would not testify against Papajohn because "[s]he is family also." 3/23/95 Tr. 31. The district court held Donnie in contempt and jailed him for his failure to testify. After ordering a continuance, the district court granted a mistrial based on Papajohn's agreement to be tried together with Earles. Pet. App. 27a-28a. When Donnie refused to testify at the joint trial, the district judge kept Donnie in jail under the previous contempt order. See *id.* at 3a-4a. In total, Donnie served 140 days in jail for contempt. See *id.* at 4a n.2.

exceptions but having equivalent circumstantial guarantees of trustworthiness" is admissible "if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence."[3]

Following their convictions, petitioners moved for judgment of acquittal or, in the alternative, for a new trial. They claimed that the district court had erred in admitting Donnie's grand jury testimony and that the government's evidence, without that testimony, was insufficient to support the convictions. The district court reversed its earlier evidentiary ruling and agreed with petitioners. The court found that it had erred in admitting the testimony under Rule 804(b)(5) because, in its view, "grand jury testimony, if admitted, must be admitted pursuant to the requirements of [Fed. R. Evid.] 804(b)(1)," Pet. App. 11a, which excludes from the hearsay rule a witness's former testimony when the party against whom the testimony is now offered had an opportunity and similar motive to cross-examine the witness at the time of the testimony. The court determined

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[3] Effective December 1, 1997, Rule 804(b)(5) was transferred to a new Rule 807 of the Federal Rules of Evidence and consolidated with former Rule 803(24), the residual exception for available declarants. The change was nonsubstantive and does not affect the issues presented in this case. For ease of exposition, we will refer to the residual hearsay exception in question as Rule 804(b)(5), which was the provision applicable at the time of trial and appeal.

that the evidence was inadmissible under the latter provision because petitioners had lacked an opportunity to cross-examine Donnie before the grand jury. *Id.* at 7a. The court then concluded that, apart from Donnie's testimony, the evidence against petitioners was insufficient to support the verdicts, and it entered a judgment of acquittal. *Id.* at 18a-19a. The government appealed. *Id.* at 29a.

5. The court of appeals reversed. Pet. App. 25a-37a. The court first held that Donnie's grand jury testimony was properly admitted under Rule 804(b)(5), and it rejected petitioners' claim that prior testimony that does not meet the requirements of Rule 804(b)(1) is for that reason categorically inadmissible under the residual exception. *Id.* at 30a-32a. In particular, the court held that the residual provision's "specifically covered" language "means only that if a statement is admissible under one of the prior exceptions, such prior subsection should be relied upon instead of subsection (b)(5)." *Id.* at 31a. The court concluded: "[I]f a statement is inadmissible under a prior hearsay exception, the statement may nonetheless be considered for admission under the catch-all exception." *Id.* at 32a.

The court found that Donnie's testimony had sufficient circumstantial "guarantees of trustworthiness" to support its admission under Rule 804(b)(5). First, the court explained, Donnie had given that testimony under oath and under penalty of perjury, and he had testified about facts within his personal knowledge. Pet. App. 33a. Moreover, "[e]xcept to admit [during his second grand jury appearance] that he knew more than earlier stated, Donnie never recanted his testimony nor did any extrinsic evidence cast doubt on the accuracy of that testimony." *Ibid.*

The court also found that Donnie was in fact "unavailable" because he had refused to testify at trial despite the government's offer of immunity, and that his grand jury testimony was therefore "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts" (Fed. R. Evid. 804(b)(5)). See Pet. App. 33a-34a.

The court of appeals followed a similar analysis in rejecting petitioners' challenge under the Confrontation Clause of the Sixth Amendment. It first noted that, under this Court's precedent, Donnie's grand jury testimony was admissible if and only if it "had particularized guarantees of trustworthiness," which "must 'be drawn from the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief.'" Pet. App. 35a (quoting *Idaho* v. *Wright*, 497 U.S. 805, 820 (1990)). The court found that this testimony met those "stringent requirements." *Ibid.* The court again noted that "Donnie's testimony was given under oath" and that he "never recanted his inculpatory testimony or expressed belated views as to its accuracy." *Ibid.* The court added that it is "unlikely that Donnie would implicate his father and Papajohn in a serious crime unless the story were true." *Ibid.* Finally, the court held that "Donnie's willingness to sit in jail instead of testifying against his father and Papajohn lends further credence to this factor" because, "[i]f Donnie's testimony would have exonerated his father, he would presumably have testified to that effect." *Id.* at 36a.

Finally, the court found "more than sufficient evidence" to sustain the guilty verdicts against petitioners. Pet. App. 36a. Papajohn's grocery store had

not been doing well and she was behind on her payments. Both petitioners found the store to be a burden, wanted to be rid of it, and had unsuccessfully tried to sell it. *Ibid.* Donnie's grand jury testimony established that Earles had made a prior attempt to burn the store, and that he had been responsible for setting the fire on the night in question, almost losing his life in the process. *Id.* at 36a-37a.

6. In June 1997, petitioners filed motions in the district court for a new trial under Federal Rule of Criminal Procedure 33 based on what they characterized as "newly discovered evidence." The "evidence" in question derives from a telephone "deposition" of Donnie Earles conducted on May 15, 1997, shortly after the court of appeals issued its decision. In that "deposition"—of which the government was given no notice and at which Papajohn's attorney asked prepared questions of Donnie and petitioner Earles' attorney conducted "cross-examination"—Donnie recanted the incriminating portions of his grand jury testimony against petitioners. See *United States* v. *Earles*, No. CR 91-4016-MWB, 1997 WL 688737, at *2 (N.D. Iowa Nov. 4, 1997).

On November 4, 1997, after conducting an evidentiary hearing, the district court denied the motions for new trial on several alternative grounds. 1997 WL 688737, at *7-*22.[4] The court first held that, "[b]ecause Donnie refused at the time of trial to provide the testimony he now proffers, even though he was a witness known to [petitioners] and he was given the opportunity to present this testimony, * * * his recantation of his grand jury testimony is not 'newly

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[4] We have lodged a copy of the district court's opinion with this Court.

discovered evidence' within the meaning of Rule 33." *Id.* at *17. Moreover, the court added, Donnie's new disclaimer of knowledge of the events in question "was actually presented in the trial, because both the May 15, 1991, and July 17, 1991, versions of [his] grand jury testimony were admitted," and, as a result, "the jury has heard this evidence before; that being so, the latest recantation cannot be considered 'newly discovered evidence' upon which to base a new trial." *Ibid.*

The court then held that, even if Donnie's post-appeal "recantation" could be considered "newly discovered evidence" under Rule 33, "it is highly unlikely that a jury at a second trial would believe his latest recantation of testimony." *Id.* at *18. The court noted that "his grand jury testimony was not recanted until the [court of appeals] held that it was properly admitted at trial. In other words, Donnie had obvious reasons to fabricate his latest recantation at the time it was finally offered." *Id.* at *19; see also *id.* at *20-*21 (noting that Donnie's latest testimony is "nebulous, at worst almost incoherent," and "simply is not credible"). The court concluded that Donnie's post-appeal recantation "is neither credible to the court, nor likely to be credible to a jury, nor likely to produce an acquittal on a retrial." *Id.* at *22.

On November 14, 1997, petitioners filed a notice of appeal from the district court's denial of their Rule 33 motion. That appeal is currently pending in the Eighth Circuit.

ARGUMENT

Petitioners claim that the admission at trial of Donnie Earles' grand jury testimony violated the Federal Rules of Evidence and the Confrontation Clause. That claim does not merit this Court's review.

1. As an initial matter, the petition should be denied because, given the unusual procedural posture of this case, this Court's review would be premature. The court of appeals' decision is interlocutory in that petitioners have not yet been sentenced and no judgment of conviction has been entered against them. In criminal cases, this Court follows a general practice of denying the defendant's request for review of interlocutory decisions, preferring instead to review any issues adjudicated in such decisions after a final judgment has been entered. See Robert Stern, Eugene Gressman, Stephen Shapiro & Kenneth Geller, *Supreme Court Practice* § 4.18, at 196 & n.60 (7th ed. 1993). The prudential reasons for following that course are particularly compelling in this case. Although petitioners have not alerted this Court to any of the recent proceedings in the district court, they moved in June 1997 for a new trial on the ground that, *after* the court of appeals rendered its decision in this case, Donnie Earles "recanted" his grand jury testimony against them. As discussed above, the district court found those motions to be without merit and denied them. Petitioners' appeal of that denial is now pending in the court of appeals.

The subject of petitioners' motions for a new trial —the veracity of Donnie's grand jury testimony—is inextricably related to the issues presented in their petition in this Court. The "evidence" at issue in

those motions, however, is not part of the record on which the court of appeals rendered its decision. Yet this Court could not, as a practical matter, review the issues presented in this case without considering the relevance of those matters—thus confronting issues that the court of appeals has not yet addressed and that are not properly before this Court. That procedural obstacle makes this case an unsuitable vehicle for addressing the legal issues on which petitioners seek review, and the petition should be denied for that reason alone. Nonetheless, because this Court has called for the government's response to the arguments presented in that petition, we address those arguments on the merits.

2. Petitioners present two principal arguments. First, they contend that an out-of-court statement is categorically barred from admission at trial under Federal Rule of Evidence 804(b)(5) if it nearly qualifies, but does not quite qualify, for admission under another exception to the hearsay rule. In the alternative, petitioners argue that, on the particular facts of this case, Donnie's grand jury testimony lacked sufficient indicia of reliability to justify its admission under either Rule 804(b)(5) or the Confrontation Clause of the Sixth Amendment. Neither of those arguments has merit, and, even apart from the procedural difficulties discussed above, neither warrants further review.

a. Rule 804(b)(5) authorizes the admission of the hearsay statement of an unavailable witness when the statement is "not specifically covered" by another Rule 804(b) exception, but has "equivalent circumstantial guarantees of trustworthiness." Fed. R. Evid. 804(b)(5). The residual exception constitutes a generally applicable basis for the admission of an out-

of-court statement of an unavailable witness when the trial court finds, on a case-by-case basis, that the statement is sufficiently reliable and meets the other requirements of the rule. See *Idaho* v. *Wright*, 497 U.S. 805 (1990). Nothing in the text of the Rule suggests that the residual exception is unavailable where another exception might apply to "similar" out-of-court statements but is not satisfied on the facts of a particular case.[5]

For that reason, and despite petitioners' suggestion to the contrary, every court of appeals that has ruled on the issue since the adoption of the Federal Rules of Evidence has concluded that an out-of-court statement can be a candidate for admission under Rule 804(b)(5) even if it nearly qualifies, but does not quite qualify, for admission under an express exception. As the First Circuit has explained, there is no basis for concluding that "the 'potential' availability of one kind of hearsay exception automatically rules out the use of another. After all, normally, hearsay testimony is admissible if it satisfies any one exception." *United States* v. *Donlon*, 909 F.2d 650, 654 (1st Cir. 1990) (upholding admission of

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[5] The legislative history supports the view that former testimony may be admitted under the residual exception in particular cases. The Senate Committee on the Judiciary justified its inclusion of a residual hearsay exception in part on the basis that, "without a separate residual provision, the specifically enumerated exceptions could become tortured beyond any reasonable circumstances which they were intended to include." S. Rep. No. 1277, 93d Cong., 2d Sess. 19 (1974). The residual exception could not function as such a safety valve if courts were precluded from admitting a statement under a residual exception whenever the statement was arguably covered by another exception but failed to satisfy its requirements.

grand jury testimony pursuant to Rule 804(b)(5)); see also *United States* v. *Clarke*, 2 F.3d 81, 84 (4th Cir. 1993), cert. denied, 510 U.S. 1166 (1994); *United States* v. *Fernandez*, 892 F.2d 976, 981 (11th Cir.), cert. dismissed, 495 U.S. 944 (1990); *United States* v. *Furst*, 886 F.2d 558, 573 (3d Cir. 1989) (addressing parallel residual exception under Rule 803(24)), cert. denied, 493 U.S. 1062 (1990); *United States* v. *Snyder*, 872 F.2d 1351, 1354-1355 (7th Cir. 1989) (upholding admission of grand jury testimony under residual exception); *United States* v. *Barlow*, 693 F.2d 954, 961-963 (6th Cir. 1982) (same), cert. denied, 461 U.S. 945 (1983); *United States* v. *Boulahanis*, 677 F.2d 586, 588-589 (7th Cir.) (same), cert. denied, 459 U.S. 1016 (1982); *United States* v. *Carlson*, 547 F.2d 1346, 1353-1355 (8th Cir. 1976) (same), cert. denied, 431 U.S. 914 (1977); cf. *United States* v. *Ismoila*, 100 F.3d 380, 393 (5th Cir. 1996) (statements that failed to satisfy requirements of business record exception were admissible under residual exception), cert. denied, 117 S. Ct. 1712, 1858 (1997); *United States* v. *Hitsman*, 604 F.2d 443, 447 (5th Cir. 1979) (same); *United States* v. *Gonzalez*, 559 F.2d 1271, 1273 (5th Cir. 1977) (finding that particular grand jury testimony lacked sufficient "guarantees of trustworthiness" to support admission under Rule 804(b)(5) because, among other considerations, fear of "physical harm * * * to [declarant] and his family" had given him "some incentive not to tell the truth"). Petitioners' contrary analysis would create "an arbitrary distinction between hearsay statements that narrowly, but conclusively, fail to satisfy one of the formal exceptions, and those hearsay statements which do not even

arguably fit into a recognized mold." *Fernandez*, 892 F.2d at 981.[6]

Petitioners are also incorrect in suggesting (Pet. 8) that the decision in this case is inconsistent with *United States* v. *Salerno*, 505 U.S. 317 (1992). That case did not involve Rule 804(b)(5). Rather, it

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[6] Apart from their reliance on the district court decision in *United States* v. *Vigoa*, 656 F. Supp. 1499 (D.N.J. 1987), aff'd, 857 F.2d 1467 (3d Cir. 1988) (Table), petitioners cite *United States* v. *Bailey*, 581 F.2d 341 (3d Cir. 1978), as evidence of a supposed circuit conflict on the proper construction of Rule 804(b)(5). Pet. 7. *Bailey*, however, is consistent with the court of appeals' decision in this case. In that case, the district court had ruled that oral statements made by the defendant's accomplice to the FBI before sentencing were not admissible as statements against penal interest pursuant to Federal Rule of Evidence 804(b)(3), but the court nonetheless admitted them pursuant to Rule 804(b)(5)'s residual hearsay exception. The court of appeals reversed on the ground that, on the particular facts of that case, the statements lacked the "guarantees of trustworthiness" required by Rule 804(b)(5). 581 F.2d at 349-351. Nowhere, however, did the court suggest that admission of other, more reliable out-of-court statements under Rule 804(b)(5) would be inappropriate on the ground that the statements nearly missed qualifying for admission under Rule 804(b)(3). Indeed, in *Furst*, 886 F.2d at 573, the Third Circuit confirmed that the parallel residual exception of Federal Rule of Evidence 803(24) "is not limited in availability as to types of evidence not addressed in the other exceptions; Fed.R.Evid. 803(24) is also available when the proponent fails to meet the standards set forth in the other exceptions." Petitioners also rely on Judge Easterbrook's concurring opinion in *United States* v. *Dent*, 984 F.2d 1453, 1465-1467 (7th Cir.), cert. denied, 510 U.S. 858, 875 (1993). As the majority opinion in that case makes clear, however, controlling Seventh Circuit case law permits the admission of grand jury testimony under the residual hearsay exception of Rule 804(b)(5) if the testimony meets that Rule's stringent criteria. See 984 F.2d at 1462.

addressed whether, when a witness asserts his Fifth Amendment privilege at trial, a court may admit the grand jury testimony of that witness against the government pursuant to Federal Rule of Evidence 804(b)(1), whether or not the government had a similar motive to cross-examine the witness when the grand jury testimony was given. Applying the requirement in Rule 804(b)(1) that former testimony may be admitted under that exception only "if the party against whom the testimony is now offered * * * had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination," the Court held that a defendant has "no right to introduce * * * [a grand jury witness's] former testimony under Rule 804(b)(1) without showing a 'similar motive.'" 505 U.S. at 322. The Court remanded for the court of appeals to consider whether the government had such a "similar motive" in that case. *Id.* at 324-325. *Salerno* holds only that, when former testimony is admitted under Rule 804(b)(1), a court may not "ignore" a specific requirement of that provision. *Id.* at 324. It does not hold that the residual exception in Rule 804(b)(5) is inapplicable to former testimony that does not satisfy Rule 804(b)(1).

b. In the alternative, petitioners also contend (Pet. 9-12) that, even if grand jury testimony is sometimes admissible under the residual hearsay exception, the particular grand jury testimony at issue in this case lacked sufficient indicia of reliability to justify its admission under either Rule 804(b)(5) or the Confrontation Clause. That factbound claim warrants no further review.

Both Rule 804(b)(5) and the Confrontation Clause of the Sixth Amendment require an inquiry into the

objective trustworthiness of a hearsay statement before the trial court may admit it. Fed. R. Evid. 804(b)(5); *Idaho* v. *Wright*, *supra*. Where, as here, the hearsay statement does not fall within a recognized hearsay exception, it must have "particularized guarantees of trustworthiness" arising from the circumstances in which the statement was made. *Wright*, 497 U.S. at 819-823. Although this Court held in *Wright* that "corroborating evidence" is not one of the circumstances to be considered, the Court "decline[d] to endorse a mechanical test for determining 'particularized guarantees of trustworthiness' under the [Confrontation] Clause," recognizing that trial courts "have considerable leeway in their consideration of appropriate factors." *Id.* at 822.

The courts that have considered whether the grand jury testimony of an unavailable witness is admissible have properly focused on the particular facts of each case, without applying a "mechanical test." See, *e.g.*, *Snyder*, 872 F.2d at 1356. Here, the court of appeals determined that the circumstantial "guarantees of trustworthiness" underlying Donnie Earles' grand jury testimony satisfied the rigorous demands of both the Confrontation Clause and Rule 804(b)(5).[7] The

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[7] Although some courts of appeals have indicated that the Confrontation Clause permits the introduction of grand jury testimony of unavailable witnesses only in unusual circumstances, none of those courts has categorically foreclosed the admission of such testimony. See *United States* v. *Gomez-Lemos*, 939 F.2d 326, 332 (6th Cir. 1991) (admission may be appropriate in "exceptional" cases); see also *Fernandez*, 892 F.2d at 981-983 (declining to "rally behind appellants' call for a *per se* ban," and noting that "extraordinarily trustworthy" grand jury testimony could be admissible under Rule 804(b)(5)); cf. *United States* v. *Flores*, 985 F.2d 770, 781-783 &

court based that determination on a combination of factors: Donnie's sworn testimony concerned matters about which he had personal knowledge; he "never recanted his inculpatory testimony or expressed belated views as to its accuracy"; the circumstances made it "unlikely that Donnie would implicate his father and Papajohn in a serious crime unless the story were true"; and "Donnie's willingness to sit in jail instead of testifying against his father and Papajohn lends further credence" to his testimony because, "[i]f Donnie's testimony would have exonerated his father, he would presumably have testified to that effect." Pet. App. 35a-36a.

Apart from their erroneous contention (see pp. 8-9, *supra*) that the text of Rule 804(b)(5) categorically prohibits the admission of prior testimony that does not meet the requirements of Rule 804(b)(1), petitioners do not argue that any one of the circumstantial factors upon which the court of appeals relied is irrelevant to the admissibility of out-of-court statements under either the Confrontation Clause or

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n.27 (5th Cir. 1993) (where government has "created its own unavailable declarant" by trying defendants jointly and seeking to introduce grand jury testimony of defendant who invokes right not to testify, and where government therefore "has the means to procure the declarant's trial testimony" by agreeing to separate trials, admission of testimony at joint trial generally violates Confrontation Clause, except perhaps in "extremely unusual case[s]"). Petitioner does not cite those decisions or contend that they conflict with the decision below, and they do not. To the contrary, the court of appeals held only that the unusual circumstances of this case combined to meet the "stringent requirements" (Pet. App. 35a) of the Confrontation Clause.

Rule 804(b)(5),[8] nor do petitioners deny that, in another case, the particular combination of those factors could be enough to warrant admission of the evidence. See Pet. 9-12. Instead, petitioners argue only that various *other* "facts in the record" (Pet. 10) —which, they claim, tend to draw Donnie Earle's credibility into question—should have led the court of appeals to find that, on balance, Donnie's testimony lacked sufficient indicia of reliability to support its admission at trial. In finding that the district court had not erred in admitting that testimony, the court of appeals tacitly rejected the factual allegations in question, either because it deemed them unsupported

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[8] For example, the petition presents no claim that the court of appeals erred in relying on Donnie's familial relationship with his father as one factor supporting the reliability of Donnie's testimony and therefore the admissibility of that testimony under the Confrontation Clause. Cf. *United States* v. *Lang*, 904 F.2d 618, 623-625 (11th Cir.) (stating, *inter alia*, that "[f]amily members are no more likely than anyone else to testify truthfully about their activities or those of their relations"; holding that it was error under Rule 804(b)(5) to admit father's grand jury testimony against son after father had recanted portions of that testimony; and nonetheless affirming conviction because error was harmless), cert. denied, 498 U.S. 924 (1990). Any such claim would have lacked merit on the facts of this case, given Donnie's express invocation of that relationship as the source of his reluctance to incriminate his father. See p. 5, *supra*. Petitioners do argue (Pet. 10) that Donnie "could not stand Papajohn"—his father's common-law wife—and that, as a result, "he had a clear motive to fabricate his testimony." That factbound argument is without merit. Donnie told the grand jury that his *father* played the principal role in setting the fire, and any tension with *Papajohn* would not have induced Donnie to "fabricate" that account of the events. See also 3/23/95 Tr. 31-32 (refusing to testify against Papajohn because "[s]he is family also").

by the record or because it found that they were outweighed by the "guarantees of trustworthiness" underlying Donnie's testimony. See Pet. App. 32a-36a.

Petitioners' challenge to the court's disposition of those allegations is factbound and without merit. For example, petitioners contend (Pet. 11) that Donnie's credibility was compromised by an alleged substance abuse problem. Whether or not Donnie had such a problem, however, the fire marshal who saw him at the scene shortly after the fire testified that he exhibited no signs of insobriety and did not appear to be under the influence of anything. 4/4/95 Tr. 130. Similarly, the government official who escorted Donnie to and from the polygraph examination testified that, when Donnie described his father's involvement in the fire, he was sober and had no difficulty remembering the events in question. See *id.* at 141-142, 145-146, 156-158, 171. There is likewise no merit to petitioners' argument (Pet. 11) that Donnie's grand jury statements were unreliable because he "failed" a polygraph examination. As discussed above (see pp. 6-7), the polygraph examiner believed that Donnie may have been holding something back about his own role in (or presence at) the fire, but that Donnie was telling the truth about his father's involvement.

Finally, petitioners are incorrect in challenging (Pet. 10) the reliability of Donnie's second grand jury testimony on the ground that Donnie was given "perjury immunity * * * so he could change his story with impunity." Donnie was immunized from perjury liability only with respect to his first grand jury appearance, not with respect to his second appearance; under his immunity agreement, if Donnie made any false accusation of petitioners during the

latter appearance, he was exposed to prosecution for perjury. See Gov't C.A. Reply Br. Addendum 4-5.[9] Moreover, despite petitioners' suggestion to the contrary (Pet. 10), there was nothing unreasonable or unusual about the government's refusal to grant Donnie total immunity from any perjury prosecution before he testified at trial. As the district court correctly observed, granting any witness such extraordinary immunity would be contrary to the interests of justice because it "would give him a free ticket to say anything that came into his head without any fear of repercussions." Pet. App. 7a n.3; see also 5/5/95 Tr. 106.[10]

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[9] At petitioners' joint trial (but not at petitioner Papajohn's earlier trial), Donnie claimed for the first time that he had felt "pressured" to testify before the grand jury. See 5/5/95 Tr. 113-114. As the court of appeals correctly determined on the record before it, however, Donnie "never recanted his inculpatory testimony or expressed belated views as to its accuracy," and he "never denied the truth of his earlier statements." Pet. App. 35a. Petitioners' apparent disagreement with that factual determination (see Pet. 10) merits no further review. It is noteworthy that petitioners do not rely on, let alone mention, Donnie's "recantation" of his grand jury testimony, which occurred after the court of appeals had issued its decision in this case but before the filing of this petition. See pp. 11-12, *supra*. Even apart from the district court's recent determination that Donnie's recantation "simply is not credible," 1997 WL 688737, at *21, any consideration of the relevance of that recantation is bound up in procedural issues—currently on appeal in the Eighth Circuit and not properly presented for review in this Court—concerning the proper treatment of allegedly "new" evidence under Federal Rule of Criminal Procedure 33.

[10] Petitioners also argue (Pet. 11-12) that, without Donnie's grand jury testimony, there was insufficient evidence to convict them, and they suggest that they are therefore entitled to

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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the judgment of acquittal that the district court granted them. Even if the district court had erred in admitting that testimony, the appropriate disposition of this case (assuming that the error was not harmless) would be invalidation of the jury's guilty verdicts, followed by a new trial, rather than entry of a judgment of acquittal. See *Lockhart* v. *Nelson*, 488 U.S. 33, 40-42 (1988) (even where some evidence has been erroneously admitted, reviewing court must nonetheless consider all evidence introduced at trial when determining whether evidence was insufficient to support conviction such that Double Jeopardy Clause would bar retrial).